No. 18-966

In the Supreme Court of the United States

DEPARTMENT OF COMMERCE, *et al.*,
Petitioners,

v.

STATE OF NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the Second Circuit

Brief of *Amici Curiae* Legal Services NYC, et al., in Support of Respondents

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INTEREST OF *AMICI CURIAE*[1]

Amici are twenty-four public interest organizations and community members dedicated to serving and empowering historically underserved communities in the New York area and beyond. The Secretary's decision to add a citizenship question to the decennial census prompts this *amicus* filing. Several *Amici* were so concerned with the impact of the citizenship question that they invested limited resources to join New York Counts 2020, a statewide coalition of public interest organizations and business groups working in partnership with state and local government officials to explore the impact of the untested citizenship question on *Amici* and the communities they serve. *Amici*'s aim is to ensure that all New Yorkers—and, in particular, those from marginalized communities in hard-to-count districts—can fully maximize their participation in the 2020 Decennial Census. With full and active participation, *Amici* hope to ensure that their community members and their members' interests are properly represented at all levels of government, and that the vital federally funded programs on which members rely remain adequately available.

Amici submit this brief to provide further context regarding how various public service organizations, particularly those that operate in the New York region, rely on complete and accurate census data that are

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amici Curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

obtained through properly vetted, rigorous data-collection procedures. Inaccurate census data, caused by the last-minute, surreptitious addition of an untested question, will harm *Amici* and the communities they serve. Thus, *Amici* have a considerable interest in the outcome of this case.

SUMMARY OF ARGUMENT

Amici and those they serve have been—and will continue to be—harmed by the Secretary's arbitrary decision to include a citizenship question on the 2020 Decennial Census. The decennial census is a constitutionally mandated undertaking to count every person residing in the United States. U.S. Const. art. I, § 2, cl. 3. Population data gathered by the census play a number of key roles at national, statewide, and community levels of governance. *See New York v. United States Dep't of Commerce*, 351 F. Supp. 3d 502, 519-20 (S.D.N.Y. 2019). For example, *Amici* rely on an accurate census for their communities' democratic representation in congressional and state legislatures, as well as on local boards. The census also impacts the communities served by *Amici* because it is the rational basis upon which about $900 billion annually in federal assistance is allocated to states, localities, and families. *See id.* at 596. Critically, *Amici* rely on census data to inform community decision-making and provide crucial services, such as legal assistance, healthcare services, local housing counseling, and small business support. Census data help *Amici* identify areas of need and provide their services to communities most in need.

Due to the complexity of the census and its related undertakings, Congress has delegated its authority to conduct the census to the Secretary of Commerce, 13 U.S.C. § 141(a), with specialized assistance from the Census Bureau, through a specific statutory scheme—the Census Act. The Census Act prescribes certain duties to the Secretary when conducting his mandated activities. *See New York*, 351 F. Supp. 3d at 521-24 (detailing statutory duties). This includes reporting requirements and deference to data collection through other administrative sources. *See, e.g.*, 13 U.S.C. § 6(c) (requiring use of available information other than direct inquiries); § 141(f) (requiring interim reports to Congress that detail planned census subjects and questions). Also arising from this statutory scheme is the critical role of the Census Bureau as the expert authority in census-related data collection. To ensure quality, scientifically objective, and accurate data for government and public use, the Census Bureau adheres to rigorous data-processing methods. And to ensure fulfillment of the central purpose of the decennial census—an actual enumeration—questions added to the form are typically subjected to *years* of thorough testing before being accepted for use in the census. *See New York*, 351 F. Supp. 3d at 526-27.

Through their organizational missions and daily interactions, *Amici* are uniquely situated to speak to the plight of the disadvantaged and marginalized communities most at risk of being uncounted and thus underserved. As the District Court for the Southern District of New York found, sufficient evidence exists to conclude that, due to the inclusion of a citizenship question on the 2020 Decennial Census, these

communities will not receive the political influence and resources that they deserve and to which they are fully entitled. *See id.* at 604-06 (addressing associational standing of non-government Respondents). While *Amici*'s constituents are most severely affected by such undercounting, all Americans are entitled to fair political representation and the effective use of tax dollars to meet community and national needs. In short, the nation depends on a fair, accurate, and credible census.

This brief adds an important perspective from civil-service, public-interest organizations to illustrate why Respondents have established standing in this case, and why the Census Act and the Administrative Procedure Act (APA) prohibit the Secretary of Commerce's arbitrary decision to add an untested and unnecessary question to the 2020 Decennial Census.

ARGUMENT

I. THE SECRETARY'S ABRUPT DECISION TO ADD AN UNTESTED CITIZENSHIP QUESTION WILL CAUSE WIDESPREAD, CONCRETE INJURIES

Article III standing is established through satisfaction of a three-part test, where a plaintiff must show: (1) an injury in fact that is (2) fairly traceable to the challenged conduct and (3) likely to be redressed by a favorable judicial decision. *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018); *see also New York*, 351 F. Supp. 3d at 573-76 (detailing legal standards). The district court rightly concluded that Respondents proved each of these elements. *See New York*, 351 F. Supp. 3d at 604.

In his principal brief, however, the Secretary argues that Respondents failed to establish that their injuries are not "fairly attributable" to the Secretary's decision to include a citizenship question on the decennial census questionnaire. *See* Pet'rs' Br. at 17. The Secretary contends that Respondents' injuries are only "fairly attributable" to third parties' refusals to respond to the census, and that those refusals arise from "speculative" fears of government misuse of data gained from third parties' responses. *Id.* at 18-19.

Notably, the Secretary does not deny the existence of palpable fears, but instead attempts to dismiss their known relevance to achieving accurate census results. *See New York*, 351 F. Supp. 3d at 580 ("Hispanics are more sensitive to survey questions about citizenship than they were a few years ago," while non-Hispanic whites "are not.") (citing Census Bureau 30(b)(6) Dep. 366-69). The Secretary imagines that if only those third parties simply followed the law, then no injuries would occur. Pet'rs' Br. at 17. The Secretary relies on this attenuated logic and speculation in an attempt to discredit his *own* specialists' conclusions. *See New York*, 351 F. Supp. 3d at 578 ("Significantly, that [the citizenship question will cause a meaningful net differential decline in self-response rates among certain populations] is the Census Bureau's *own* considered view."); *id.* at 583 ("Notably, even Defendants conceded at oral argument that there is 'credible quantifiable evidence' that 'the citizenship question could be expected to cause a decline in self-response.'").

Amici's own experiences confirm the correctness of the district court's conclusion that Respondents suffer concrete harms from, and that those harms are fairly traceable to, the Secretary's decision to add an untested citizenship question to the decennial census.

A. The Secretary's Citizenship Question Will Result in an Inaccurate Count

The district court found that inclusion of the citizenship question will cause a "net differential" decline in self-response rates, and that the decline could not be cured through the Census Bureau's follow-up procedures. *See id.* at 578, 583. The decline is a "net differential" decline because it would be unique to certain households. *Id.* at 578 n.34. The parties jointly stipulated to this fact, and the district court found that "[r]acial and ethnic minorities, immigrant populations, and non-English speakers have historically been among the hardest groups to count." *Id.* at 577. These groups "have proved especially difficult to count completely and accurately" and thus have been undercounted in prior censuses and surveys for several reasons. *Id.* The district court found that despite the Census Bureau's affirmative outreach to certain hard-to-count groups, net differential undercounts have persisted. *Id.* For example, the 1990 census undercounted Hispanics by almost five percent, and the 2010 census undercounted more than 1.5 million Hispanic and African-Americans. *Id.* In self-responses among noncitizen households, the citizenship question was proven to cause a net differential decline of *at least* 5.8%. *Id.* at 583.

Notably, the district court found:

> The evidence in the trial record overwhelmingly supports the conclusion that the addition of a citizenship question in the 2020 census will cause a significant net differential decline in self-response rates among noncitizen households (that is, households with a least one noncitizen). Significantly, that is the Census Bureau's *own* considered view. *See e.g.*, Brown Memo at 39, 54. Indeed several persuasive Census Bureau analyses support this position, and no evidence in the record – from Defendants or otherwise – contradicts it.

Id. at 578; *see also id.* at 579, 583 (finding that "[s]eparate and apart from its effects on self-response rates among noncitizen households," "the citizenship question will also cause a significant decline in self-response rates among Hispanic households").

Accordingly, the sudden addition of an untested citizenship question has been proven to exacerbate the undercount of these populations, further injecting inaccuracies into crucial census data used to support these very populations. *Amici* work closely with these hard-to-count groups. Based on their relationships with their communities, *Amici* confirm the district court's findings that the citizenship question will cause lower response rates among these groups.

For instance, in January 2019, members of *Amicus* Service Employees International Union 32BJ (SEIU 32BJ), one of the largest unions of property service workers in the United States, participated in a focus

group that assessed the potential impact on its members of adding a citizenship question. A majority of participating members confirmed that they would not fill out the decennial census if the citizenship question is added. Ten out of twelve members also expressed their understanding that the question would greatly affect whether or not their friends and family would participate as well.

Other *Amici* have observed among their members a similar inclination to avoid responding. For example, Nobody Leaves Mid-Hudson (NLMH), an organization that aims to protect and empower the working-class community of New York's mid-Hudson area, has learned that, if the citizenship question is on the survey, many of NLMH's members would not complete the census due to fear caused by potential misuse of divulged information.

In sum, *Amici* have experienced firsthand the chilling effect that a citizenship question will have on overall response rates to the decennial census. While *Amici* will increase outreach and education to dispel community members' trepidation if the citizenship question is included, the likelihood that *Amici* will succeed in eliminating such trepidation is low. Thus, *Amici* expect that, even with the best of outreach efforts, which are inherently constrained by funding limitations, an increase in non-response rates among those that *Amici* serve will likely occur.

The citizenship question alone will cause an increased undercount. The fears of *Amici*'s community members are real and actionable, and have become increasingly apparent in today's environment, where

requests to divulge sensitive information are met with heightened reservation. *See* Memorandum from the Ctr. for Survey Measurement to the Assoc. Directorate for Research & Methodology 1 (Sept. 20, 2017), https://www2.census.gov/cac/nac/meetings/2017-11/Memo-Regarding-Respondent-Confidentiality-Concerns.pdf (reporting "recent increase in respondents spontaneously expressing concerns about confidentiality" during test surveys conducted in 2017). Although members' misgivings about answering a citizenship question may exacerbate increased non-response rates, the citizenship question is the actual cause.

B. An Inaccurate Count Harms Organizations Dedicated to Underserved and Undercounted Communities

The district court identified several injuries in fact that would occur should citizenship status be asked on the decennial census. *See New York*, F. Supp. 3d at 606-07. Of the injuries identified, the district court determined that the non-government Respondents in particular had established injuries in the form of loss of government funding, decrease in the quality and accuracy of census data, and diversion of resources.

As similarly situated non-government organizations, *Amici* attest to these harms. That is, with more inaccurate census data, all *Amici* expect to see a decrease in funding available to their community members and an increase in the amount of resources needed to address the citizenship question.

1. Loss of Federal Funding

Not only do many *Amici* themselves depend on federal funding to provide their communities with much-needed services, but many *Amici*'s members and clients also rely on federal assistance programs to thrive.

For example, *Amicus* Legal Services NYC (LSNYC) provides legal services to low-income New Yorkers so that they are able to meet their basic needs in all areas of life. This includes helping clients obtain critical state and federal benefits, protecting their education rights, and guiding them through the immigration process. To provide its services, LSNYC relies on federal funding received from numerous sources, including: funding distributed by the Legal Services Corporation (LSC); grants authorized by the Violence Against Women Act and distributed through the Department of Justice (DOJ); grants distributed by the Department of Housing and Urban Development through its Fair Housing Initiatives Program; grants authorized through the Ryan White HIV/AIDS Program; and grants distributed by the Internal Revenue Service through its Low Income Taxpayer Clinic program.

The overwhelming majority of LSNYC's clients are members of consistently hard-to-count populations, and often live in areas that make them especially at risk of being inaccurately represented in census data. For instance, Brooklyn contains a high concentration of residents most desperately in need of LSNYC's services. Located in Kings County, New York, this area is considered one of the hardest-to-count counties in the nation. Census 2020 Hard to Count (HTC) Map

Application, https://www.censushardtocountmaps2020.us/ (select "County" in "Search By" drop-down menu; enter "Kings County" in search bar; select "New York Kings County" in search results) (last visited Mar. 28, 2019). Based on the latest census estimates, approximately 80% of Kings County's current population of 2.6 million live in hard-to-count neighborhoods, where response rates are less than 73% and frequently less than 60%. *See id.* Many of these neighborhoods include a high concentration of lower-income and immigrant populations. *See id.* (under "Populations at Risk of Being Undercounted" header, select "Low-Income Population" or "Immigrants" from drop-down menu to view statistics) (stating that about 42% of Kings County's population is in or near poverty and about 37% of population was born outside U.S.). Their tendency and ability to respond are limited by a number of factors.

Aside from historical mistrust of government inquiries, these communities are more likely to have limited, or completely lack, internet access (estimated to be almost 22% of households, *id.*), making outreach efforts more difficult and responses less likely. Unique living situations common to Brooklyn (*e.g.*, large public housing and higher occurrence of group-living situations) along with language barriers similarly increase the difficulties faced by outreach efforts. And because Brooklyn is a melting pot of the affluent and the working class, census data regarding Brooklyn's demographic makeup often skews representation of the affluent class higher given its higher response rate. This results in reduced funding available for LSNYC to meet the needs of its clients. Indeed, after the last

census, LSNYC lost a significant amount of LSC funding because of an undercount. LSNYC expects a further decrease in funding due to an increase in non-response rates caused by the citizenship question.

In addition, less funding resulting from inaccurate census data would greatly impact the operations of other *Amici* and their ability to provide the services their community members need. For example, Chhaya Community Development Corporation (Chhaya CDC) provides housing counseling and small business support to New York City's South Asian community, a diverse, immigrant population, which has been, and continues to be, undercounted in the census. Chhaya CDC expects that, with less available funding, it will be exponentially harder for its community members to gain access to affordable housing and ownership opportunities in an already high cost-of-living area.

Similarly, Opportunities for a Better Tomorrow (OBT) aims to break the cycle of poverty by providing crucial education and employment services for youth, individuals, and families in underserved communities. Over 65% of OBT's funding is federally sourced, allowing it to serve more than 4,000 families annually. The adult education and immigration services provided by OBT alone support nearly 2,000 people a year. OBT's capacity to serve many of these community members would be harmed by inaccurate census data.

Likewise, members of PPESA provide communities in need with statewide access to family-planning and sexual and reproductive health services, which are supported by federal funding. Since many clients that rely on these services are members of immigrant

communities and notoriously hard-to-count populations, their underrepresentation in census data would make it more difficult for PPESA members to meet their clients' health needs.

For many *Amici*, their constituents also directly receive federal funding that would be at risk due to inaccurate census data. SEIU 32BJ, for instance, represents more than 160,000 men and women in eleven states along the East Coast and in Washington, DC. Local 32BJ members come from sixty-four countries and speak twenty-eight languages. Some members are United States citizens, and others are noncitizen immigrants. Coming from a range of socioeconomic backgrounds, many of its members benefit from a variety of vital, anti-poverty programs that meet their most basic needs. SEIU 32BJ has a strong interest in maintaining its members' ability to access those programs, but, with inaccurate census data, its members' ability to receive funding will likely diminish. The same can be said for members of NLMH and clients of LSNYC.

2. Diversion of Resources

Amici have already committed funds to outreach efforts ahead of the 2020 Decennial Census. In prior decades, New York State primarily relied on the federal government to perform outreach. Fiscal Policy Institute, *Funding a Complete Count in 2020: What Community Groups Need* 1 (2018), http://fiscalpolicy.org/wp-content/uploads/2018/10/FPI-Brief-Census-Outreach-Funding.pdf. In 2010, the state began allocating roughly $2 million in funds to community-based organizations like *Amici* to ensure that the

diversity of New York—whose 62 counties all include hard-to-count populations—was accurately captured by the census. *Id.* at 1-2, 4, 6. Such limited funding, however, provided less than optimal results. *Id.* at 1, 6. So, for the 2020 Decennial Census, the Fiscal Policy Institute has proposed that New York's governor and legislature allocate $40 million to aid community-based organizations in their outreach efforts. *Id.* at 1. Whatever funding may be received, *Amici* expect that more extensive outreach efforts would be needed, and that greater resources would need to be devoted to those efforts, to mitigate the proven increase in non-response rates due to the addition of a citizenship question. *See New York*, 351 F. Supp. 3d at 616-17 (noting that "the Census Bureau itself relies on [non-government organizations] to ensure a successful census—and will rely on them to counteract the indisputably negative effects of the citizenship question").

Census outreach efforts are already a resource-intensive undertaking. Efforts encompass workshops that inform and encourage the community to respond, assistance in obtaining computer access,[2] and supporting follow-up efforts. Moreover, *Amici* often serve communities that speak many different languages. Community members also routinely work

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[2] The year 2020 will be the first in which the Census Bureau asks residents to fill out census forms online. Fiscal Policy Institute, *supra*, at 1. As touched upon in section I.B.1, community members served by *Amici* have a higher likelihood of having limited or no internet access. Thus, *Amici* already expect an increased need for resources to ensure that communities are able to obtain and fill out census forms.

irregular hours or live in non-traditional housing, making outreach all the more difficult. Resources are needed to reach out to these community members in an effective way. Chhaya CDC, for instance, expects to spend approximately $120,000 for its census outreach campaign. League of Women Voters, which works to increase voter registration, education, and participation, expects to touch more than 700 communities across the country with its outreach efforts. Those efforts include sharing key educational materials about the census and acting as a conduit to assist people in accessing the forms or information they need to complete the process.

However, these efforts to mitigate the anticipated increase in non-response due to a citizenship question likely will fall short. *Amici* expect that greater outreach efforts will be needed. Those greater efforts will include, for example, increased volunteer requirements and training, more frequent door-knocking efforts, and more informational advertisements. Moreover, *Amici*'s community members are often individuals with noncitizen status—a group most likely to view the citizenship question with skepticism. Thus, the additional costs to address this change would be significant. For example, if a citizenship question is included on the census, Chhaya CDC expects to increase spending by about 50% just to preserve the *status quo* proportional representation. The funding necessary to meet the increased outreach goals would not be guaranteed, making *Amici*'s efforts to mitigate the harm to their communities virtually certain to fail.

II. THE CENSUS ACT AND THE APA PROHIBIT THE SECRETARY'S DECISION TO ADD AN UNTESTED QUESTION TO THE DECENNIAL CENSUS

The Secretary's purported reason for including a citizenship question is deceptively simple: by asking the entire population whether they are citizens, more accurate citizenship-status data regarding those residing in the United States would be obtained. This, allegedly, would allow the Department of Justice to better enforce provisions of the Voting Rights Act (VRA).[3] This Court has held that agency action is arbitrary and capricious, and thus prohibited by the APA, "if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because the communities most in need of *Amici*'s services are already susceptible to undercounts, *Amici* are especially interested in ensuring that the administration of the census conforms to the requirements of the Census Act and the APA. As the district court correctly concluded, the Secretary's

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[3] Significantly, the district court found "no evidence in the Administrative Record that would support a finding that more granular [citizen voting age population (CVAP)] data is 'necessary' for enforcement of the VRA and plenty of evidence to the contrary." *New York*, 351 F. Supp. 3d at 386; *see also id.* at 387 n.71 (collecting cases indicating sufficiency of sample-derived CVAP data to enforce VRA claims).

approach did not; instead, his rationale is not in accordance with the law, runs counter to the evidence before him, and fails to meaningfully consider the citizenship question's impact on the constitutional purpose of the decennial census.

A. The Secretary's Decision Is Not in Accordance with the Law

As the district court noted, section 6(c) of the Census Act requires the Secretary to exhaust other means for obtaining data needed by other agencies before adding a question to the decennial census. *See* 13 U.S.C. § 6(c) ("To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available . . . instead of conducting direct inquiries."). The Census Bureau identified one such means: administrative records, which provide sufficient, and likely superior, citizenship data for the DOJ's VRA enforcement needs. *See, e.g.*, *New York*, 351 F. Supp. 3d at 532-39, 649-51. According to the Secretary, however, administrative records were not enough. The Secretary believes—with no corroboration—that even if he uses administrative records to the "maximum extent possible," probing each individual in the country is still necessary. *See* Pet'rs' Br. at 45-48.

The district court flatly rejected this argument and found that the Secretary "ignored, and violated, a statute that requires him . . . to collect data through the acquisition and use of 'administrative records' *instead* of through 'direct inquiries' on a survey such as the census." *New York*, 351 F. Supp. 3d at 516. Indeed,

absolutely no analysis or even attempt was made to determine whether the data gleaned from administrative records alone was sufficient for DOJ's purposes. *See id.* at 638-39. Thus, the Secretary failed to meet his burden of showing that administrative records had been used to the "maximum extent possible."

B. The Secretary's Decision Runs Completely Counter to the Overwhelming Evidence Before the Secretary

The district court provided a thorough analysis as to why the record evidence established that the inclusion of a citizenship question would result in *less* complete and accurate citizenship data. The Secretary claims that the district court's conclusions are unfounded because the evidence—provided by the Census Bureau itself—does not *empirically* prove that an undercount would result. *See* Pet'rs' Br. at 30-31. This argument is unavailing because the asserted infirmity in the evidence is attributable to the Secretary's own inaction and to his choice to base decision-making on political influences rather than on evidence.

The evidence presented by the Census Bureau was the absolute best information available at the time of the Secretary's decision-making, and that evidence showed that inclusion of a citizenship question would harm the accuracy of the decennial census data. *See, e.g.*, *New York*, 351 F. Supp. 3d at 649-50 ("The problem is all relevant evidence in the Administrative Record establishes that adding a citizenship question to the census will result in *less* accurate and *less*

complete citizenship data."); Recommendations and Comments to the Census Bureau from the Census Scientific Advisory Comm. Spring 2018 Meeting 1 (Mar. 30, 2018), *available at* http://www.pogoarchives.org/m/cp/POGO-CSAC-Recs-Spring_20180406.pdf ("[J]ust because there is not clear evidence that adding the [citizenship] question would harm the census accuracy, this is not evidence that it will not."). This harm, in turn, would infect all related calculations that guide political representation, funding, and governance policy-making. *See New York*, 351 F. Supp. 3d at 594-600. A letter from six former Census Bureau directors sent to the Secretary confirms as much: there, the former directors cautioned that adding a citizenship question would reduce the accuracy of the 2020 census to the detriment of all. *See id.* at 525 n.7, 541. To confirm these conclusions, the Secretary could have performed testing that was a standard and mandatory part of the Census Bureau's operating procedures. This testing would have allowed the Secretary to make a more informed decision and determine exactly how the question would impact data accuracy. Instead, the Secretary disregarded evidence presented by the Census Bureau's specialists and was instead guided by political interests. He cannot now rely on the "uncertainty" of the Census Bureau's evidence to dismiss its conclusions without having done any additional analytical due diligence.

C. The Secretary's Decision Failed to Consider the Impact of the Citizenship Question on the Census's Constitutional Purpose of Actual Enumeration

Upon considering a full trial record, the District Court for the Northern District of California also determined that "[t]he Secretary's decision to add a citizenship question to the 2020 Census violates the Enumeration Clause of the Constitution because its inclusion will materially harm the accuracy of the census without advancing any legitimate governmental interest." *California v. Ross*, No. 18-cv-01865-RS, slip op. at 121 (N.D. Cal. Mar. 6, 2019). The record in this case supports no other conclusion.[4]

The decennial census serves a key constitutional purpose: achieving an "actual enumeration" of those residing in the United States for apportionment purposes. U.S. Const. art. I, § 2, cl. 3. As this Court has recognized, there is a "strong constitutional interest in [the] accuracy" of the census. *Utah v. Evans*, 536 U.S. 452, 478 (2002). Yet, without any rational cost-benefit analysis, the Secretary arbitrarily decided that enforcement of the VRA necessarily outweighed maintaining an accurate census count. Indeed, the

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[4] Given the urgent nature of the issue, on March 15, 2019, this Court directed the parties to brief and argue the additional question as to whether the Secretary violated the Enumeration Clause of the U.S. Constitution. While this issue was affirmatively reached on the merits only in the co-pending case in the Northern District of California, the parties agreed that the record below amply supports review of the issue in this case. *Amici* briefly provide their views on the additional question.

Secretary provided no explanation as to why including a citizenship question was now so critical to VRA enforcement as to justify its last-minute, untested inclusion in the decennial census, when the cost of that inclusion was to skew the census-based allocation of political representation and of federal, state and local funding.

As determined by the district court, "[e]ven assuming DOJ's VRA enforcement efforts would benefit from block-level citizenship data, there is no evidence to support the conclusion that surveying residents about their citizenship would increase the accuracy of available block-level citizenship data." *California*, slip op. at 123. In fact, the district court found that "all evidence . . . points to the opposite conclusion—that the inclusion of the citizenship question would ultimately yield *less citizenship accurate data* than relying on administrative records and imputing the citizenship status of persons for whom such data does not exist." *Id.* The absence of objective evidence to the contrary supports a finding that the Secretary acted outside his authority.

CONCLUSION

The decennial census is a—perhaps *the*—foundational constitutional mechanism on which our representative democracy was built and our nation still runs. The Secretary's authority to include a given question is not "unlimited," and his discretion is subject to legal scrutiny. While policy may guide decision-making to a degree, the process must still observe statutory and constitutional restrictions. The massive and complex undertaking that is the decennial census,

and its consequences over the next decade for so many stakeholders, including *Amici* and those they serve, demand a transparent, considered, and lawful process. The Secretary failed to meet that demand. The public should not bear a decade-long burden because of the Secretary's failure.

Respectfully submitted,

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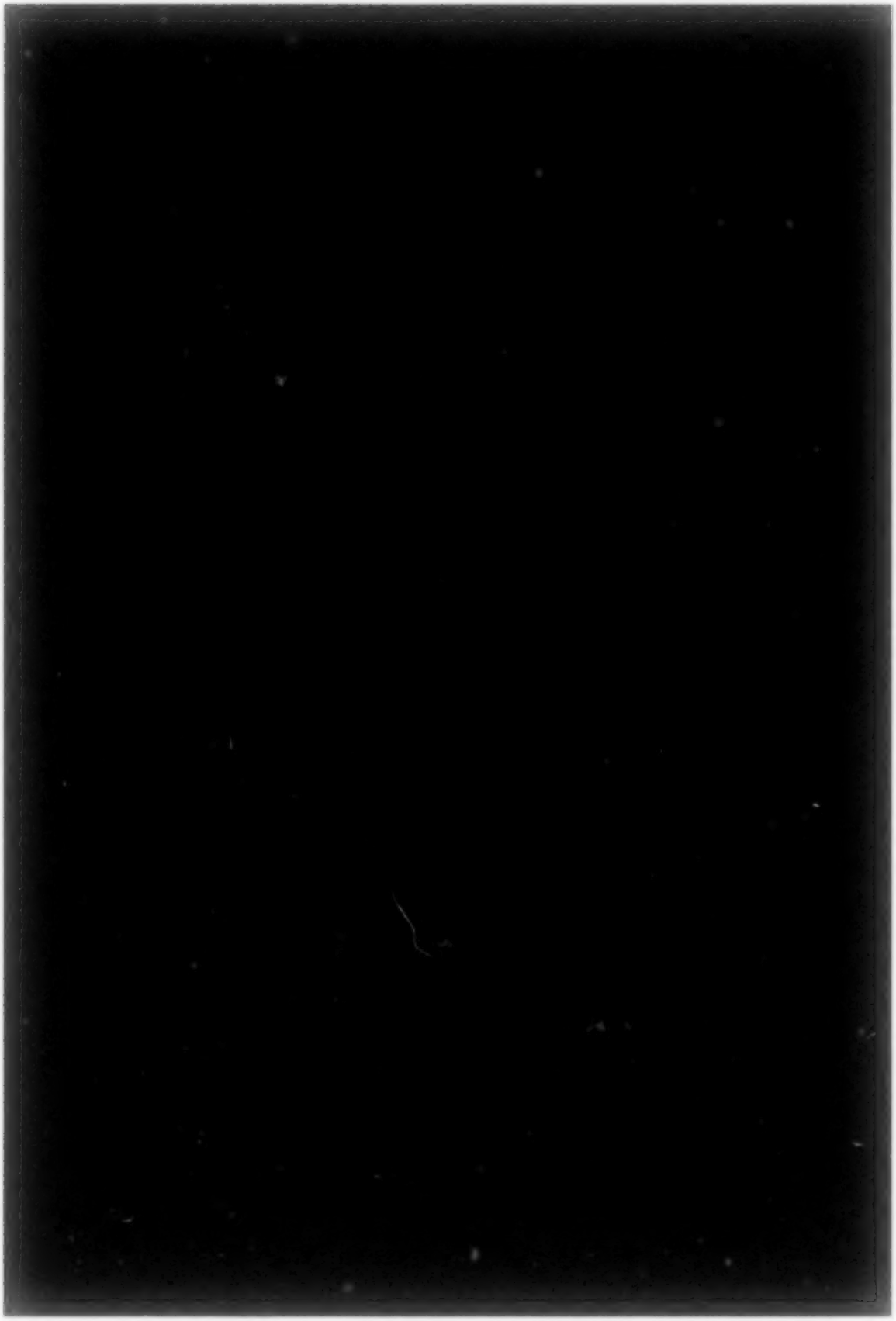

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APPENDIX – LIST OF *AMICI*

Legal Services NYC

ACCESS of WNY

Arab American Association of NY

Asian Americans for Equality

Association for Neighborhood and Housing Development

Brooklyn Community Foundation

Chhaya Community Development Corporation

Chinese-American Planning Council, Inc. (CPC)

Federation of Protestant Welfare Agencies (FPWA)

Grace Immigrant Outreach (GIO)

Human Services Council

League of Women Voters of New York State

LSA Family Health Service, Inc.

New York City Council Member Carlina Rivera, in her personal capacity

Northern Manhattan Improvement Corporation (NMIC)

Nobody Leaves Mid-Hudson

Organization of Chinese Americans (OCA)-Asian Pacific American Advocates - New York

Opportunities for a Better Tomorrow

Planned Parenthood Empire State Acts

Service Employees International Union 32BJ

South Asian Fund for Education, Scholarship and Training (SAFEST)

We Count Inc.

Wild Autumn Inc.

YMCA of Greater New York